(2)

No. 89-1654

IN THE

Supreme Court Of The United States

October Term, 1989

STATE OF ALABAMA
Petitioner

vs.

DOUGLAS FREEMAN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF OF RESPONDENT IN OPPOSITION

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, Douglas Freeman, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment in this case.

OPINION BELOW

Petitioner has duplicated matter on pages two and three of its Petition with respect to the opinion below. Aside from this, Respondent adopts Petitioner's state-

ment of the opinion below. We add that *no opinion* has been issued by an Alabama Appellate Court.

JURISDICTION

Respondent challenges jurisdiction under 28 U.S.C. § 1257(3).

REASONS WHY THE WRIT SHOULD BE DENIED

The Jurisdiction of this Court has not been properly invoked. Petitioner would have us believe that the basis of jurisdiction in this case is 28 U.S.C. § 1257(3). More particularly we suppose, that a title, right, privilege or immunity was specially set up or claimed under the Constitution of the United States and that Alabama Courts have misinterpreted the application of same.

This case concerns a suppression of evidence against Respondent. Respondent's Motion to Suppress is set out on pages seven and eight of the Petition with "emphasis supplied." We now reproduce the Motion with our own "emphasis supplied."

> "7. That the Constitutional rights guaranteed to the Defendant, *both* under the Constitution of the United States of America *and the Constitution of the State of Alabama, against unreasonable search and seizures have been violated.*" (R.p. 84; emphasis supplied)

Let us now look at the pertinent portions of the Alabama and United States Constitutions.

AMENDMENT FOUR, UNITED STATES CONSTITUTION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE ONE, § FIVE,
CONSTITUTION OF ALABAMA 1901

That the People shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrant shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

It cannot be gainsaid that there is not a dime's worth of difference between the two Constitutional provisions and that Alabama's provision is fully adequate to adjudicate the question below.

This Court has consistently held that it will not review a State Court judgment based on adequate nonfederal grounds and this be true even if a federal question was involved and perhaps wrongly decided. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

The reasoning behind this principle has been quite clearly stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judg-

> ments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

The principle is so deeply rooted that even where, after oral argument has been heard, an adequate state ground becomes evident the Writ of Certiorari will be dismissed. *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958).

Another principle to be considered is that where both federal and nonfederal questions are properly raised in the record, but no opinion is delivered by the highest state court in rendering its judgment, this Court ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which may be found adequate to support it. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Adams v. Russell*, 229 U.S. 353, 358 (1913); *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Phyle v. Duffy*, 334 U.S. 431 (1948); and see *Williams v. Kaiser*, 323 U.S. 471, 477 (1945).

If it be said that the nisi prius judgment and opinion somehow became the opinion and judgment of the Alabama Supreme Court and the Alabama Court of Criminal Appeals, we would agree that the nisi prius judgment became that of the Appellate Courts, but the opinion did not. Even if it be said that the nisi prius opinion was somehow flawed, it would not be the first time that an appellate court upheld a nisi prius court that rendered the right decision for the wrong reason. See a myriad of Alabama cases culminating at *Kaercher v. State*, 554 So.2d 1143 (Ala. Cr. App. 1989), *cert. denied*, 554 So.2d 1152 (Ala. 1989).

In any event:

> This Court, however, reviews judgments, not statements and opinions. . . . Moreover, even if

> the opinion be considered ambiguous, we should choose the interpretation which does not face us with a Constitutional question.

Black v. Cutter Laboratories, 351 U.S. 292, 297-299 (1956).

Where adequate state grounds are asserted, "*petitioner*, in order to establish our jurisdiction, *must demonstrate* that neither of these state grounds can account for the decision below." *Durley v. Mayo*, 351 U.S. 277, 281 (1956) (emphasis supplied).

Likewise, the jurisdictional burden is not met where the highest court of the state delivers no opinion and "it appears that the judgment *might* have rested upon a nonfederal ground." *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

Interestingly enough the Petitioner itself, as Appellant below, agreed that state and federal grounds were before the Courts below at page ii of its initial brief to the Alabama Court of Criminal Appeals under Certificate of Service dated July 12, 1989, Petitioner listed in the table of Constitutional provisions there at bar *Alabama Constitution, 1901*, Article I, Section 5.

In the same brief at pages 10 and 11 Petitioner respectively opined:

> It is the need for security in facilities dedicated to the confinement of persons of criminal, often violent, propensity which makes such searches "reasonable" U.S. Constitution Amendment Four; *Alabama Constitution, 1901, Article I, Section 5.* (emphasis supplied)

> . . . His Honor suppressed this evidence, not because it violated the Fourth Amendment or *its sister provision of the State Constitution*, but because the search at issue here allegedly violated the Warden's memorandum. (emphasis supplied)

Again in its reply brief to the Alabama Court of Criminal Appeals under Certificate of Service dated August 8, 1989, Petitioner again listed the Alabama Constitutional provision at page ii of its brief.

In an application for rehearing under Certificate of Service dated October 6, 1989, we find at page ix "The Learned Trial Judge correctly found that the search of the Appellee was fully consistent with the *Constitutions of the United States and the State of Alabama*." (emphasis supplied)

In the same application for rehearing at page 10 we find "The Trial Court suppressed the evidence in this case on finding that although the search was in accordance with the Federal and *State Constitutions*, it violated the prison Warden's rule." (emphasis supplied)

In its Petition for a Writ of Certiorari filed in the Alabama Supreme Court under Certificate of Service dated November 22, 1989, we find the following at pages 1 and 3 respectively:

> The Circuit Court of Montgomery County in suppressing the evidence, expressly found that the search did *not* violate the Federal or *State Constitutions*. (emphasis supplied)
>
> Where a search is in conformity with the United States and *Alabama Constitutions* . . . (emphasis supplied)

In its Brief in support of the Petition under Certificate of Service dated November 22, 1989, we find that at page ii of the brief the *Alabama Constitution, 1901*, Article I, Section 5 is listed in the Table of Constitutional provisions at bar.

In the same brief at page 13, the *United States Constitution*, Amendment Four and *Alabama Constitution, 1901*, Article I, Section 5 is cited.

Alabama is hoist with its own petard. Curiously

enough it is passing strange that in its petition to this Court, Alabama's Article I, Section 5, disappeared from view.

We would not want to be misunderstood to say that if the shoe were on the other foot and the evidence was *not suppressed* in a dual federal-state ground situation, that a federal question would not be presented for review. A constriction of a federal right in a dual federal-state ground situation is not permissible. An extension in scope of a Federal Constitutional right perhaps not due to be granted by federal standards, nevertheless, would stand if it involved a similar State Constitutional right.

It is crystal clear that this case could have been decided pursuant to *Article I, Section 5 of the 1901 Constitution of Alabama*, even though the Fourth Amendment was involved. This Court has consistently refrained from reviewing cases where State and Federal grounds coexist, even though wrongly decided.

CONCLUSION

The Petition is due to be and ought to be dismissed instanter, out of hand, for failure to assert a federal question. Adequate nonfederal grounds were presented below which could sustain the judgment. Respondent prays that the Petition be dismissed and that he be allowed to go hence this day with his costs expended.

Respectfully submitted,

James M. Fullan, Jr.,
Attorney for Respondent

CERTIFICATE OF SERVICE

I, James M. Fullan, Jr., Attorney for Douglas Freeman, the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of June 26, 1990, I served three copies of the above and foregoing, Brief of Respondent in Opposition, on the Honorable Don Siegleman, Attorney General of the State of Alabama and the Honorable Joseph G. L. Marston, III, Assistant Attorney General of the State of Alabama, Attorneys for the Petitioner, by mailing in the United States mail a copy of same in a duly addressed envelope with first class postage prepaid to the Honorable Don Siegleman, Attorney General of the State of Alabama and the Honorable Joseph G. L. Marston, III, Assistant Attorney General of the State of Alabama at the Office of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama 36130.

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